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In The

Supreme Court of the United States

October Term, 1998

AMOCO PRODUCTION COMPANY, ON BEHALF OF ITSELF AND THE CLASS IT REPRESENTS,

Petitioners,

v.

SOUTHERN UTE INDIAN TRIBE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* STATES OF MONTANA, NEW MEXICO, NORTH DAKOTA, UTAH, AND WYOMING IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF AMICI STATES 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. PRINCIPLES OF FINALITY AND OF CONSTRUCTION BY PLAIN MEANING THAT FORM THE FOUNDATION OF PROPERTY RIGHTS IN THE UNITED STATES PRECLUDE THE RETROACTIVE MODIFICATION OF LAND GRANTS 5

(A) Common Sense and the Plain Meaning of the Coal Lands Acts Compel the Conclusion that the Federal Government Did Not Reserve Gas in the Coal Reservation 5

(B) The Finality of Federal Land Grants 8

II. GEOLOGICAL PRINCIPLES DEMONSTRATE THAT COALBED GAS IS NOT COAL 10

(A) Coalbed Gas Is Removed From Coal By Commonly Used Methods 10

(B) Coalbed Gas Is Removed From Coal With No Damage To Or Destruction Of Coal .. 14

III. THE SOCIAL AND ECONOMIC IMPACTS OF THE TENTH CIRCUIT'S DECISION WILL DISRUPT ECONOMIES ESTABLISHED IN RELIANCE ON THE LAND GRANT LAWS ... 15

(A) School Funding and Tax Revenues 15

(B) Divesting Property Owners of Vested Property Interests 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Amoco Production Co. et al. v. Southern Ute Indian Tribe, 151 F.3d 1251 (10th Cir. 1998) ..... *passim*

Andrus v. Utah, 446 U.S. 500 (1980) 16

Beecher v. Wetherby, 95 U.S. 517 (1877) 16

Burke v. Southern Pac. R. R. Co., 234 U.S. 669 (1914) 1, 6, 7, 11

Colorado Coal & Iron v. United States, 123 U.S. 307 (1887) 9

Johanson v. Washington, 190 U.S. 179 (1903) 16

Wyoming v. United States, 255 U.S. 480 (1921) ... 1, 2, 9, 16

STATUTES

Enzi Act, P.L. No. 105-367, 112 Stat. 3313 (1998) 18

Act of April 30, 1912, 37 Stat. 105, codified at 30 U.S.C. Section 98 (the "1912 Act") 16

OTHER AUTHORITIES

B.P. Tissot & D. H. Welte, *Petroleum Formation & Occurrence* 229 (2d ed. 1984) 11

Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Comm. on Pub. Lands, 59th Congress 12-13 (1907) (testimony of Edgar E. Clark, Interstate Commerce Commissioner) 7

TABLE OF AUTHORITIES – Continued

Page

James E. Fassett, *Coal-Bed Methane – A Contumacious, Free-Spirited Bride; The Geologic Handmaiden of Coal Beds, in Energy Frontiers in the Rockies* 132 (John C. Lorenz *et al.* eds., 1989) 11

Ownership of And Right to Extract Coalbed Gas in Federal Coal Deposits, 88 Interior Dec. 538 (1981) 15

Thomas Jefferson, Letter to William Johnson, June 12, 1823, in *Works of Thomas Jefferson* 7:297 (H.A. Washington ed. 1854) 5

INTERESTS OF AMICI STATES

In the late nineteenth and early twentieth centuries, Congress sought to encourage the exploration and settlement of the western portion of the United States. Congress sought to stimulate westward expansion by providing, as inducements for settlement, patents issuing title to homesteaded lands. Many lands were passed from the federal government to the patent holder without reservation. Many other lands, such as those subject to the 1909 and 1910 Coal Lands Acts, were passed by patents which contained specific reservations to the federal government. For generations, patentees and their successors have relied on the specific language of their patents for rights conveyed and rights reserved by the federal government.

In *Burke v. Southern R. R. Co.*, 234 U.S. 669, 698-99 (1914), this Court held that "[t]here must be some point in time when the character of the land must be finally determined; and for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent." Once title passes, it passes free of all unexpressed conditions of subsequent claim to minerals and the grantee acquires a vested right. *Wyoming v. United States*, 255 U.S. 480 (1921). This case deals with an express and specific reservation. If a mineral reservation can be construed so contrary to the ordinary meaning of the word used, to in effect become a reservation of a different mineral by implication, then the character of the land was not finally determined when the patents issued. The defining issue in this case is whether land patents are final, or if, by disregarding a specific reservation, land grants can be perpetually held open to a

"possibility of reverter" to the federal government of any interest the federal government may later find profitable.

The Tenth Circuit's interpretation of the Coal Lands Acts of 1909 and 1910 divests thousands of patentees of their reasonable expectations for 20 million acres of land patented under the Acts, representing at least 128,500 patents. The original patentees, their successors in interest, and entire economies relied upon the certainty and finality of land grants resting on the plain language of the Coal Lands Acts. The Amici States have a compelling interest in the preservation of existing law relating to patents issued by the United States and in the protection of their property interests and those of their citizens against the United States' expansion of reservations through feigned ambiguity. In addition, the Amici States' tax bases and local economies will be adversely affected by the Tenth Circuit decision; their courts and regulators will be asked to draw meaningless distinctions between natural gases originating in the coalbed and gas originating from other sources; and the confusion the decision creates will subject the Amici States and their citizens to ongoing litigation over ownership of produced gas and over compensation for past production.

SUMMARY OF ARGUMENT

Property law rests on the basic rule that if an interest in the property is not specifically reserved, it passes to a purchaser or grantee. *Wyoming v. United States*, 255 U.S. 480 (1921). The Tenth Circuit's disregard for this basic

rule is at the heart of this case. Land grants and reservations must warrant, on their face, the certainty and finality of property conveyances. For ninety years, there was no question, not even with the federal government, that Congress had not reserved gas in the Coal Lands Acts.

The Tenth Circuit ignored the plain and ordinary meaning of the word Congress used in the Coal Land Acts and that the United States used in crafting the language of patent reservations issued pursuant to those Acts. The Tenth Circuit erred when it held that "coal" was ambiguous. The meaning of "coal" could not be more clear. But because coal is porous, and adsorbs coalbed gas, the Tenth Circuit held that coalbed gas is actually part of the coal. 151 F.3d at 1260. In basing its conclusion on the fact that coal gas production in 1909 and 1910 was not considered viable, the Tenth Circuit admitted that Congress was concerned only with reserving coal in the Coal Lands Act. 151 F.3d at 1261, 1263. Congress did not manifest any interest in gas residing in the coal estate, despite the fact that it was aware of the existence of coalbed gas. It did not intend to reserve gas within or outside of the coalbed. If Congress had so intended, it was required, but failed, to make such a reservation express in the Acts and patents.

The Tenth Circuit's decision seeks to erect ambiguity by disregarding the word Congress actually used. The decision requires the assumption that, when Congress used the word "coal" in the Coal Lands Acts, it knew of and intended to reserve the natural gases contained in any reserved coal formation. At the same time, it requires the assumption that, while Congress knew how to expressly reserve coal and other minerals, it somehow

failed to articulate a reservation of gas along with the coal it specifically reserved.

The decision of the Tenth Circuit will be difficult, if not impossible, to apply. Because of the migratory nature of gas, known methods of production cannot prevent coalbed gas and non-coalbed gas from being produced through the same well bore. Moreover, geologists cannot determine with accuracy whether gas found in the coalbed is different from non-coalbed gas. The Tenth Circuit's ruling will only foster disputes about who owns the gas produced. The Tenth Circuit's decision will demand, on a case-by-case basis, ad hoc determinations of who owns what gas, rather than relying on a rule of law that can be applied across the board without litigation. When "gas" is not necessarily "gas," the Tenth Circuit's opinion creates ongoing uncertainty of title. The Amici States ask the Court to restore their citizens and their economies to the certainty and predictability found in the traditional principles of land grants and statutory construction that have long provided the stability necessary to meet America's demand for natural resources.

ARGUMENT

I. PRINCIPLES OF FINALITY AND OF CONSTRUCTION BY PLAIN MEANING THAT FORM THE FOUNDATION OF PROPERTY RIGHTS IN THE UNITED STATES PRECLUDE THE RETROACTIVE MODIFICATION OF LAND GRANTS

(A) Common Sense and the Plain Meaning of the Coal Lands Acts Compel the Conclusion that the Federal Government Did Not Reserve Gas in the Coal Reservation

> Laws are made for men of ordinary understanding, and should, therefore, be construed by ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties, which may make anything mean everything or nothing, at pleasure.[1]

As this quoted passage would indicate, Thomas Jefferson would have had no problem telling the difference between coal and gas. When the metaphysical possibilities of words are taken to their extreme, they lose their value "for men of ordinary understanding." "Coal" refers to a solid, rock-like substance. Coal cannot mean "gas," even when gas is found in a bed of coal. To say otherwise ignores the plain, ordinary meaning of these words.

The Tenth Circuit held that the definition of coal must be determined by unsupported scientific reasoning. For example, it found that gas is part of coal because "the adsorbed component of CBM is molecularly attracted to

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[1] Thomas Jefferson, Letter to William Johnson, June 12, 1823, in *Works of Thomas Jefferson* 7:297 (H.A. Washington ed. 1854).

coal." 151 F.3d at 1260. Under this analysis, the Tenth Circuit has gone to the atomic level to discern whether coal is coal and gas is gas.

This Court has directed that language is to be given a *practical* construction. In *Burke v. Southern Pac. R. R. Co.*, 234 U.S. 669, 679 (1914), this Court was asked to give effect to the strictly scientific view that petroleum is "a resultant of the decomposition of organic matter under certain conditions of temperature and pressure, *and therefore is not a mineral.*" (Emphasis added). Construing a reservation of "mineral lands" contained in the railway land grant act of 1866, this Court rejected a "strictly scientific" definition as "not the test contemplated by the statute." *Id.* Rather than relying on a scientifically based test, the Court prescribed a practical approach in *Burke*, holding that Congress "was dealing with a practical subject in a practical way, and we think it used the words 'mineral lands,' and intended that they should be applied, in their *ordinary and popular* sense." *Id.* (emphasis added). Setting aside the geologic and chemical confusion in the Tenth Circuit's opinion, *Burke* requires that words be given their common meaning so that the dangers Jefferson forewarned so long ago are not realized: that 'meaning is sought for in metaphysical subtleties, which may make anything mean everything or nothing, at pleasure."[2]

If intent is needed at all, the Congressional history of the Acts reveals that Congress intended to reserve only coal. The detailed history of the Coal Lands Acts shows

[2] *Id.*

that Congress was motivated by the "coal famine," which struck at the turn of the twentieth century, driving a serious concern over the price, supply, and control of the country's primary source of energy.[3] Although Congress knew of the existence of coalbed gas,[4] there is no evidence that Congress was concerned about retaining its rights over gas and no evidence that Congress intended to reserve anything more than the vital coal reserves with which it was concerned. There is simply no reason to resort to any rule of interpretation.

The Tenth Circuit invented ambiguity by refusing to give the term "coal" its plain meaning and moved on to the presumption that "ambiguity or uncertainty in the terms employed [in land grants] should be resolved in favor of the government." 151 F.3d at 1257 (*citing Burke v. Southern Pac. R. R. Co.*, 234 U.S. 669, 680 (1914)). Beyond the inescapable recognition that coal as a solid cannot be considered gas, a statute (like a contract) is only ambiguous if it is subject to more than one reasonable interpretation. The failure to reserve a known substance cannot be equated with ambiguity. The simple fact is that Congress did not reserve rights to the coalbed gas. To hold otherwise would be to: (1) rewrite the statutes and patents issued under the statutes; and (2) give the federal government the ability to reopen mineral grants to assert post-transfer claims to unreserved minerals, destroying

[3] *See Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Comm. on Pub. Lands*, 59th Congress 12-13 (1907) (testimony of Edgar E. Clark, Interstate Commerce Commissioner).

[4] 151 F.3d at 1261.

the finality of land grants. As Judge Tacha observed in her dissent to the Tenth Circuit's decision, "the 1909 and 1910 Acts do not mention the Holy Grail, the Hope Diamond, or my left shoe." 151 F.3d at 1269-70. Yet had any of these things been found within a coalbed reserved by the United States, that would hardly mean that they might actually be considered "coal." *Id.*

Under the new paradigm of gas ownership created by the Tenth Circuit, private parties can no longer rely on gas being gas and coal being coal. Parties must now consider whether the gas is characteristic of coalbed gas for which they paid but *cannot* produce, because it has been reacquired by the federal government, or if it is "other gas," which they *can* produce. Then too, they must now ask whether the Tenth Circuit's reasoning will eventually impact other reservations and conveyances that do not distinguish between shale gas, coalbed gas, or gas within oil reserves. If coal does not mean coal, and gas does not mean gas, then every reservation that has long relied on such words of ordinary meaning is open to question.

(B) The Finality of Federal Land Grants

The Tenth Circuit's decision calls into question the validity of land grants made under the Coal Lands Acts by creating the equivalent of a reservation by implication ninety years after the grants were made. This approach departs from the concept of finality as it refuses to recognize that Congress, in retaining rights only to coal, relinquished all other mineral interests to the grantees. As the

Tenth Circuit acknowledged, Congress knew of the existence of coalbed gas at the time of the Acts. 151 F.3d at 1261. If Congress did not know that coalbed gas would later be workable or profitable, this lack of knowledge is irrelevant to the finality of the land grants that Congress made. This Court long ago held that when Congress had knowledge of certain minerals it did not forecast as profitable, failing to expressly reserve them when the patent issued, those minerals passed to the patentee:

> A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of sale. The question must be determined according to the facts in existence at the time of the sale.

Wyoming v. United States, 255 U.S. 489, 498 (1921) (*citing Colorado Coal & Iron v. United States*, 123 U.S. 307, 328 (1887).) Once title passed, it passed free of all unexpressed conditions of subsequent claim to minerals. The grantee acquired a vested right which no subsequent discovery or claim of mineral will divest or disturb. *Wyoming v. United States* at 499. The fact that coalbed gas is now recognized as commercially valuable does not mean that the patentee's title can now be altered or revoked. The Tenth Circuit's reliance on the fact that "CBM was not commercially severable in 1909 and 1910 and thus had no value,"[5] conflicts with the rule of *Wyoming v. United States* that title must be determined at the time of the transfer, not at a subsequent date. The Amici States

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[5] 151 F.3d at 1263.

and their citizens have every right to expect that once Congress decided that it would retain only coal under land grants made pursuant to the Coal Lands Acts, it relinquished all other mineral interests in those lands, including gas. When Congress wanted to reserve all known minerals it did so in 1916; when it wanted to reserve "gas," it did so in the 1914 Act. In the 1909 and 1910 Acts, Congress reserved only coal.

II. GEOLOGICAL PRINCIPLES DEMONSTRATE THAT COALBED GAS IS NOT COAL

(A) Coalbed Gas Is Removed From Coal By Commonly Used Methods

The Tenth Circuit was persuaded that there was enough information in the record about the "unique nature of CBM" to conclude that even if Congress had intended only to retain solid rock coal, "Congress in 1909 *may have* considered CBM to be part of that solid coal." 151 F.3d at 1260 (emphasis added). The court's reasoning rejected the specific reservation of coal in favor of an unarticulated and speculated intent. Turning to its technical analysis, the court asserted that the reserved coal contained coalbed gas in an "occluded" state, which meant that coalbed gas was actually part of the coal. *Id.* The term "occluded," however, describes the porousness of solid coal, which adsorbs the gas, not that coalbed gas is coal.

The same geological processes of bacterial action, burial, compaction, and geothermal heating that produce

oil and natural gas also produce coal.[6] For example, the same process is responsible for the presence of gas found in carbonaceous shales. The Tenth Circuit erroneously believed that this same process is somehow different for coalbed gas. It found that "CBM is generated as part of the chemical and physical processes which convert carbon-rich sediments into solid coal (coalification)." 151 F.3d at 1260. Indeed, the Tenth Circuit's new view of coal is so broad that it removes any distinction between coal and gas. The Tenth Circuit's reasoning would hold that oil, gas, and coal are all the same because they are all carbon-based and are all formed through organic, thermal, and environmental forces. This is the same type of approach that the Court rejected in *Burke*, adopting instead the ordinary and popular use of words.

Because the process that produces coal (coalification) yields a coal rock that is porous, the coal acts as a reservoir for the gas (and water and other gas and liquid),[7] as well as a reservoir for gas migrating from other formations. While the court correctly recognized that the gas can be adsorbed onto the surface of the coal, it incorrectly believed that the gas could not be released without an alteration in the physical state of the coal and could not be released without often causing significant damage to the coal. 151 F.3d at 1260. Therefore, the court concluded that the coalbed gas must be actually part of the coal. The

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[6] B.P. Tissot & D.H. Welte, *Petroleum Formation & Occurrence* 229 (2d ed. 1984).

[7] James E. Fassett, *Coal-Bed Methane – A Contumacious, Free-Spirited Bride; The Geologic Handmaiden of Coal Beds, in Energy Frontiers in the Rockies* 132 (John C. Lorenz *et al.* eds., 1989).

properties of coal and natural gas demonstrate that this conclusion is incorrect.

Like gas contained in tight sands or within oil reserves, the porous structure of coal is simply a storage vehicle for natural gas.[8] In the Powder River Basin of Wyoming, for example, coalbed gas is produced by pumping water from the coalbed, which lifts the pressure on the gas and allows it to rise to the surface naturally. If coalbed gas were part of the solid rock coal, as the Tenth Circuit believed, then such a simple production technique would not be possible. Moreover, if coalbed gas were actually part of the coal, it could not migrate. Yet, like all other natural gas, coalbed gas is mobile. While it may originate in coal seams, it demonstrates no hesitation to migrate to adjacent formations. Indeed, evidence before the district court and the Tenth Circuit demonstrated that coalbed gas frequently migrates many kilometers. World renowned gas deposits, such as those in the North Sea, originated from coal and migrated to non-coal formations.[9]

The Tenth Circuit's opinion looks to the location of the gas and seeks to draw distinctions between kinds of natural gas rather than relying on the established principle that gas is gas. The Tenth Circuit has departed from the age old rule of capture, adopting a new law of origin. Specifically, the Tenth Circuit seeks to differentiate between gas that finds its origin in coal and gas having a

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[8] *Id.*

[9] Appellant's Appendix, Tenth Circuit Court of Appeals, Vol. 8, pp. 1714, 1716.

non-coal origin. Science is unable to tell which of the many organic, thermal, and environmental factors acting upon carbon based sediments over millions of years are responsible for creating the gas found in the coalbed, or for that matter, whether the gas found in the coalbed is even of a coal origin.

While the Tenth Circuit's decision suggests that gas found in the coalbed would initially be treated as "coal," once it is no longer adsorbed by the solid coal, it appears that the coalbed gas would change from "coal" to "gas" under the court's rationale. Prior to the Tenth Circuit's decision, segregation of natural gases according to their origin was not only impractical, but unnecessary since the natural gas owner's rights extended to all gas produced on his lands, regardless of origin. Although such segregation remains impractical, if not impossible, it will be necessary if the Tenth Circuit's decision stands.

To further complicate this matter, the Amici States contain a mixed or "checkerboard" land ownership pattern for both surface and subsurface lands owned by the federal government, states, railroad companies or their successors in interest, ranchers, and mineral companies. Since land ownership is so fragmented, any effect on the lands subject to the Coal Lands Acts will also affect adjoining undisputed lands. Because of the migration of coalbed gas, entire natural gas production fields could be affected by the Tenth Circuit's decision even if individual well bores are drilled on undisputed lands.

(B) Coalbed Gas Is Removed From Coal With No Damage To Or Destruction Of Coal

The Tenth Circuit's view that gas is part of coal was also based on the court's belief that "the adsorbed component of CBM is molecularly attracted to coal and cannot be released without an alteration in the physical state of the coal." 151 F.3d at 1260. Although this is incorrect, the court sought to bolster the claim by asserting that "release of either adsorbed or fracture-trapped CBM requires production techniques which often cause significant damage to the coal." *Id.* In fact, the Court found that "[a]dsorbed CBM, which comprises most of the 'gas' within coal, can be economically produced only by techniques which artificially induce changes in the coal reservoir." *Id.* at n. 10. Again, the Tenth Circuit is incorrect.

For decades operators have drilled degassing wells to vent coalbed gas without destruction of the coal deposits. The method used to produce coalbed gas from the Powder River Basin in Wyoming dispels the Tenth Circuit's notion that production of coalbed gas artificially induces changes in the coal reservoir. In the Powder River Basin, coalbed gas is located 300 to 600 feet from the surface. Gas rises to the surface when operators pump water from the formation, leaving the coal unharmed and available to the owner of the coal estate for subsequent extraction by mining. A simple technology is used to produce the coalbed gas without altering or destroying the coal formation.

III. THE SOCIAL AND ECONOMIC IMPACTS OF THE TENTH CIRCUIT'S DECISION WILL DISRUPT ECONOMIES ESTABLISHED IN RELIANCE ON THE LAND GRANT LAW

The Tenth Circuit's decision has a direct bearing on the stability of the local economies of the Amici States. The Amici States are mineral dependent states. Part of the natural gas production from the Amici States is coalbed gas. The mineral owners and gas producers in the Amici States have relied on the 1981 Department of Interior Solicitor's opinion, which concluded that the United States (i) did *not* reserve coalbed gas when it reserved "coal" under the 1909 and 1910 Acts, (ii) *did* reserve coalbed gas when it reserved "oil and gas" under the 1914 Act, and (iii) would regulate coalbed gas under gas, not coal, regulatory authority.[10] Curiously, the federal Respondents withdrew the 1981 Solicitor's opinion on the same day they filed their brief in this action opposing certiorari, noting in their brief that the opinion had been withdrawn.

(A) School Funding and Tax Revenues

The Amici States receive severance taxes on coalbed gas production, a portion of which is returned to local

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[10] *See Ownership of And Right to Extract Coalbed Gas in Federal Coal Deposits*, 88 Interior Dec. 538 (1981). To address energy supply issues arising from the Arab Oil Embargo, the federal government took steps to encourage development of domestic energy sources. It led efforts to convert coalbed gas from what was universally regarded as a hazard to the important natural gas resource it is today.

governments. The decline in production occasioned by the uncertainty over coalbed gas ownership will result in a loss of revenue to the Amici States and their local governments. The Amici States are sustained by minerals and the disruption of the tax revenues from coalbed gas production could be harmful to local governments within these states.

The Amici States are also mineral owners, in their own rights, of lands granted under the Coal Lands Acts, including school lands. Congress granted each of the western public land states designated sections of federal lands upon the admission of the western states to the Union for the express purpose of supporting public schooling. *See Andrus v. Utah*, 446 U.S. 500 (1980). Some of those lands were subject to the reservations of the Coal Lands Acts.[11] The decision of the Tenth Circuit calls into question the Amici States' ownership of coalbed gas underlying all lands granted under those Acts and ignores the rule articulated in *Wyoming v. United States* that "the legislation of Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively." *Wyoming*, 255 U.S. at 508 (*citing Beecher v. Wetherby*, 95 U.S. 517, 526 (1877) and *Johanson v. Washington*, 190 U.S. 179 (1903)).

The Tenth Circuit's ruling imposes no small burden on the Amici States. Monies generated from coalbed gas

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[11] In 1912, Congress acted to permit states to make "in lieu" selections of known federal coal lands, subject to a reservation of coal to the United States in accordance with the 1910 Act. Act of April 30, 1912, 37 Stat. 105, codified at 30 U.S.C. Section 98 (the "1912 Act").

production are tied directly to school funding and cannot be replaced by other revenue sources. For example, in Utah, royalties from coalbed gas production are the largest single source of revenue from that state's school lands. If the Tenth Circuit's decision is upheld, Utah could lose ownership of coalbed gas underlying more than 27,000 acres of school lands, resulting in the loss of tens of millions of dollars that would otherwise be placed in Utah's Permanent School Fund. Utah's Permanent School Fund not only supports public education, but provides essential services for the disabled. The other Amici States would be similarly affected. New Mexico could lose more than 10,000 acres of gas production that fund common schools and institutions such as the Miners' Hospital of New Mexico, the New Mexico Boys' School, and the New Mexico School for the Deaf. Wyoming could lose more than 13,000 acres of potential revenues from gas production to fund its beleaguered school financing system.

Certainly, with respect to the non-school lands, as a result of Tenth Circuit's decision, the Amici States may enjoy 50 percent of the federal royalties derived from leases of coalbed gas on private lands patented under the 1909 and 1910 Acts. As a matter of principle, however, the Amici States believe that the decision reached by the Tenth Circuit is wrong in its expansion of the express reservation of patents, and should be reversed.

(B) Divesting Property Owners of Vested Property Interests

The Tenth Circuit's decision presents an immediate problem for property owners, as well as all those whose incomes rely upon them in the Amici States. There are hundreds of thousands of successors to Coal Lands Act patents throughout the Amici Sates. The unleased property owners now face a very real dilemma: either they lease their natural gas interests, and face the possibility of litigation over whether any gas production is coalbed gas, or they do not lease and thereby lose potential royalty payments from non-coalbed gas sources.[12] Since natural gas migrates, if these owners do not lease, their neighbors could deplete their gas reserves. The people impacted are typically individuals who planned to use royalty proceeds for purposes such as land improvements, college educations, and retirement. These successors to the 1909 and 1910 Acts patents would be required to live with continuing uncertainty under the Tenth Circuit's opinion. That uncertainty will inescapably lead to many rounds of otherwise unnecessary litigation over the ownership of the natural gas estate.

The Tenth Circuit's opinion, if left to stand, introduces ongoing title uncertainty in the production not

[12] The Enzi Act, P.L. No. 105-367, 112 Stat. 3313 (1998), has a limited reach. The Act applies only to lands subject to a lease or contract in effect as of the date of its enactment. The Enzi Act will not apply to vast amounts of unleased lands. Wyoming producers who sought passage of the Enzi Act estimate that it affects only about 5% of the lands patented under the 1909, 1910, and 1912 Acts.

only of coalbed gas, but because of its migratory nature, other natural gas reserves. Gas producers will be subject to mineral trespass claims and royalty owners to claims of conversion of property belonging to the United States or its successors in interest. Operators may be required to negotiate new leases with coal owners, reimburse the federal government or its successors in interest for royalty payments made to the owners of the oil and gas estate, and then seek to recoup monies paid under leases previously entered in justifiable reliance on the belief that gas is gas. The economic incentive to produce coalbed gas will quickly dissipate if the Tenth Circuit's decision is affirmed.

CONCLUSION

Because the Tenth Circuit's decision upsets fundamental tenets of property law and the rule that patent reservations must clearly articulate the property interests reserved at the time the patent issued, and due to the significant impact a change of ownership of the gas estate in coalbeds will have on the states, their local economies,

and their citizens, the Amici States ask this Court to reverse the decision of Tenth Circuit Court of Appeals.

Respectfully submitted,

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